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In the Supreme Court of the United States

October Term, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Petitioners,

vs.

PEOPLE AGAINST NUCLEAR ENERGY, et al.,
Respondents.

METROPOLITAN EDISON CO., et al.,
Petitioners,

vs.

PEOPLE AGAINST NUCLEAR ENERGY, et al.,
Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONS OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION, THE UNITED STATES OF AMERICA AND THE METROPOLITAN EDISON CO., ET AL., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FILED ON BEHALF OF THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 678 F.2d 222. The Orders of the Nuclear Regulatory Commission reviewed by the Court of Appeals and ancillary opinions are reported at 12 N.R.C. 607 and 14 N.R.C. 593, respectively.

JURISDICTION

The amended judgment of the Court of Appeals was entered without supporting opinions on April 2, 1982, Judge Wilkey dissenting. A modified version of the amended judgment with opinions was entered on May 14, 1982. On June 23, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 20, 1982. The Chief Justice further extended the time for filing such a petition to and including August 30, 1982. Respondents sought and were granted an extension of time for filing in opposition until September 30, 1982, by the Clerk of the Court in Case No. 81-2399, a connected case to No. 82-358. Jurisdiction is invoked under 28 U.S.C. §1254(1).

INTEREST OF AMICUS CURIAE

The National Rural Electric Cooperative Association ("NRECA") is a non-profit national service organization for some 1000 rural electric cooperatives, which provide central station electricity to nearly 25 million consumers in 46 states. Rural electric cooperatives distribute roughly 11% of the nation's electricity and serve ten percent of the population. As cooperatives, owned by the consumers of

their electricity, NRECA members seek to provide a reliable source of energy at the lowest possible cost. NRECA supports the position of petitioners, Nuclear Regulatory Commission and the United States of America in case no. 82-358, and the petitioners, Metropolitan Edison Co., *et al.*, in case no. 81-2399 currently before the Court.

The future construction by NRECA's members of generating units and associated facilities, which often involves preparation of environmental impact statements, will be adversely affected by the decision of the court below. NRECA members generate electricity from a variety of facilities, including fossil fuel-fired steam generating units, nuclear units and hydroelectric facilities. NRECA members also distribute electricity generated by other utilities. NRECA members have financial interests in additional generating capacity which is currently planned or under construction, including several thousand megawatts of nuclear capacity.

The Court of Appeals' decision, by designating psychological well-being and similar intangible conditions as "environmental effects," significantly expands the procedural requirements under NEPA applicable to these facilities, thereby directly affecting NRECA's members and their consumer-owners. Delay in the development and construction of nuclear and other power plants, which the Court of Appeals' decision assures, is of major concern to the membership.

Furthermore, for NRECA members to plan effectively for the delivery of electrical services in the future, they must be able to gauge adequately which type generating plants can be built and safely operated without interruption. The Court of Appeals' decision, however, has created a state of uncertainty with regard to the long-term via-

bility of nuclear power. Therefore, the questions presented require clear, deliberate and prompt resolution.

NRECA has obtained written consent of all parties below to the filing of this brief pursuant to Rule 36.1 of the Rules of this Court.

ARGUMENT

This case presents to the Court a crucial issue regarding the future of the National Environmental Policy Act ("NEPA")—whether there are *any limits* to the issues which federal agencies must examine in environmental impact statements ("EIS"). In characterizing "psychological stress" as an "environmental effect," the Court of Appeals has usurped the role of Congress and converted an EIS to a forum for airing the diverse emotional and political responses which accompany most major federal acions.

The Court of Appeals' decision requires the Nuclear Regulatory Commission to prepare a supplemental EIS addressing psychological stress if the Commission determines that significant new circumstances regarding the mental health of individuals living near the Three Mile Island Unit No. 1 nuclear reactor have arisen since preparation of the original EIS on the facility. This unprecedented expansion of NEPA's obligations is based on interpretations of NEPA by the Court of Appeals which will lead to a severe distortion of the EIS process: (1) an EIS will have to determine individual mental and emotional responses to every major federal action, not just the direct physical effects to the environment which may occur as a result of that action, and (2) the EIS will become a policy document discussing political reactions to major federal actions.

The Court of Appeals has given a signal to opponents of major federal actions to raise objections at a new level of sophistication and complexity, serving only to hamstring decisionmakers on nuclear power as well as other major federal actions. The litigation and delays which will unquestionably result from the Court of Appeals' decision can be averted only by this Court promptly curtailing the broad policy holding of the court below and reinstating the EIS to its limited role - examining direct physical environmental effects.

The Court of Appeals' novel interpretation of NEPA deserves no less scrutiny than this Court gave to *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978), an earlier attempt by the same Court of Appeals to restructure the requirements imposed upon the Nuclear Regulatory Commission pursuant to NEPA and the Administrative Procedure Act. This Court's summation of the lower court's decision in *Vermont Yankee, supra*, 435 U.S. at 550 is as apt here:

> While the court's rationale is not entirely unappealing as an abstract proposition, as applied to this case we think it basically misconceives not only the scope of the agency's statutory responsibility, but also the nature of the administrative process, the thrust of the agency's decision, and the type of issues the intervenors were trying to raise.

The Court of Appeals has misconceived the proper role and scope of the EIS under NEPA, and that misconception creates a procedural quagmire which will vitiate the EIS process and negate the important, but limited, objectives of an EIS.

I. Congress Intended the Environmental Impact Statement to Be a Discrete Limited Tool for Analysis of Physical Impacts on the Environment Which Result From Federal Actions.

The enactment of NEPA in 1969 reflected congressional recognition that federal actions which can change the environment must be more carefully assessed. NEPA was thus designed "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. §4321 (1976). In furtherance of that goal, Congress required that federal agencies contemplating a major federal action which significantly affects the environment carefully examine those environmental effects through an EIS. Section 102 of NEPA 42 U.S.C. §4332 (1976),thus provides in pertinent part:

> (2) [A]ll agencies of the Federal government shall -
>
> * * *
>
> (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

> (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The focus of the EIS is man's *physical environment* and the effects of federal decisions on that environment.

> What is involved is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: that we will not intentionally initiate actions which will do irreparable damage to the air, land, and water which support life on earth.
>
> * * *
>
> The basic principle of the policy is that we must strive in all we do to achieve a standard of excellence in man's relationship to his physical surroundings.

115 *Cong. Rec.* 40416 (1969) (statement of Senator Jackson). Numerous courts have confirmed that the subject of the EIS is physical effects. *See, e.g., Image of Greater San Antonio v. Brown*, 570 F.2d 517, 522 (5th Cir. 1978); *National Association of Government Employees v. Rumsfeld*, 413 F. Supp. 1224, 1229-30 (D.D.C. 1976), *aff'd mem. sub nom. National Association of Government Employees v. Brown*, 556 F.2d 76 (D.C. Cir. 1977).

The EIS has a specific role: to identify the physical environmental effects of a proposed action and possible alternatives to the action. Having considered such information, the responsible federal official can then make his decision, exercising value judgments and policy considerations consistent with his statutory mandate. NEPA in no way requires the EIS to be the vehicle to identify, analyze or balance the policy determinations made by Congress and

federal officials. The EIS, while comprehensive, is not without limits.

Limitation of the EIS to physical effects on the environment does not mean that Congress failed to recognize the relationship of the environment to human emotions. To the contrary, Congress appreciated these other ramifications.

> A national environmental policy would, however, necessarily be concerned with natural resources issues. But the total environment needs of man - ethical, aesthetic, physical, and intellectual, as well as economic - must be taken into account.

115 *Cong. Rec.* S1784, 1787 (daily ed., February 18, 1969). The Senate Committee on Interior and Insular Affairs of the Senate, in categorizing an extremely long list of environmental quality problems, acknowledged that some of those problems may create conditions which "detract from man's social and psychological well-being." *S. Rep. No.* 91-296, 91st Cong., 1st Sess. 4 (1969).

Acknowledgement that there are emotional aspects of man's relationship with the physical environment does not, however, lead to the conclusion that Congress intended or directed that such *emotional responses* be identified or considered in the EIS assessment of *environmental effects*. Yet, the Court of Appeals has adopted just that approach.

Such a change in the role of the EIS should not, however, be sanctioned. This Court has previously acknowleged the marked difference between Congress' broad purpose in enacting NEPA and the specific procedural obligation Congress has imposed upon federal decisionmakers: "NEPA does set forth significant substantive goals for the

Nation, but its mandate to the agencies is essentially procedural." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. at 558.

The congressional limitation of the EIS to the study of physical environmental effects is not inconsistent with Congress' concerns for aesthetics, psychological well-being and other human emotional responses. By assuring that the environmental effects which give rise to the emotional response are fully understood and considered, the EIS addresses those congressional concerns. The emotional response, even if accompanied by physical manifestations, remains a derivative phenomenon dependent exclusively on the individual mental reaction to the federal action, not a physical effect of the action. The case at issue vividly demonstrates this distinction inasmuch as it involves *only* an emotional response to the possibility of future nuclear accidents; there were no separate physical impacts on the environment.

Although Congress may have required the EIS examination of physical environmental effects in part because of potential emotional responses, this does not turn such responses into environmental effects which the EIS must examine. It is the interposition of the human mind that creates a distinct category of incidents, separate from physical environmental effects which the EIS can reasonably assess. The views of individuals on the proposed action, whether politically or emotionally based, are in the realm of policy considerations properly left to Congress and to Executive Branch officials implementing their specific legislative authority. The EIS is only one element in the decisional process and it is limited to physical environmental effects.

The Court of Appeals placed special emphasis on PANE's claim that individual emotional reactions resulted

in impaired health. However, the proper issue for determining application of NEPA was not whether the health of PANE's members was affected but rather the source of the health effects. The ailments alleged by PANE were produced by individual mental and emotional conditions; they did not arise from any effects on the environment of a federal action. Psychological impacts, whether strictly emotional or with physical manifestations, remain outside the scope of the EIS because they have their genesis in the mental state of the individual, not the physical environment.

Furthermore, even though characterized as "post-traumatic psychological distress," the responses of PANE's members are essentially no different in their derivation from any other adverse emotional reaction which may be engendered by disagreement with a federal decision. Such emotional responses have previously been held to be outside the scope of the EIS. *See, e.g., Maryland-National Capital Park and Planning Commission v. U.S. Postal Service,* 487 F.2d 1029, 1038-39 (D.C. Cir. 1973) where the court found that the EIS requirement of a "substantial inquiry" or "hard look":

> [w]as not contemplated, as a matter of reasonable construction of NEPA, where the claim of NEPA application is focused on alleged esthetic impact and the matters at hand pertain essentially to issues of individual and potentially diverse tastes.

Just as the decisionmaker should not have to quantify effects on human aesthetic enjoyment of nature in the EIS, he should not have to determine other emotional responses. *Hanly v. Kleindienst,* 471 F.2d 823, 833 (2d Cir. 1972), *cert. denied,* 412 U.S. 908 (1973).

II. The Court of Appeals' Decision Will Have a Significant Adverse Impact on NEPA by Injecting Political and Policy Considerations Into the EIS Process.

Excluding psychological stress from the scope of the EIS does not do violence to NEPA nor does it mean that there is no proper policy forum in which such contentions can be raised. The record reveals that an extensive review of PANE's contentions was made by the TMI-2 Commission. *See, Report of the President's Commission on the Accident at Three-Mile Island, The Need for Change: The Legacy of TMI* (Oct. 1979). Such strong emotional responses to nuclear power should be expressed to the Congress as part of its consideration of national policies on nuclear power. Conversely, the addition of such political considerations to the requirements of NEPA will wreak havoc with the EIS process.

The Court of Appeals' inclusion of such factors in the EIS is not based upon consideration of the proper role of the EIS in NEPA, nor upon congressional intentions as expressed in the legislative history, nor upon construction of any applicable prior case law. It is, instead, yet another judicial redefinition of the EIS as a conveniently available forum to compel examination of peripheral issues, along with the study of environmental effects, because of the court's concern that they will not receive adequate attention elsewhere. That concern, however, is properly a subject for Congress, not the courts; all effects of a congressional or administrative decision cannot be translated into "environmental effects" in order to fit them into the EIS review. This Court must curb such judicial reformulation of the congressionally-mandated EIS process where the obvious purpose is "to impose upon the agency [the court's] own notion of which procedures are best or most

likely to further some vague, undefined public good." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. at 549.

In the thirteen years of NEPA's existence, the actions covered by NEPA, as well as the scope of an EIS, have been expanded significantly by the vast number of court opinions which have examined individual federal actions. While stretching NEPA, those decisions have heretofore maintained a thread of consistency. Courts have only required that federal agencies give the mandatory "hard look" to the physical impacts on the environment which may result from the action under review, not emotional responses.[1]

While the fabric of NEPA has some elasticity, it cannot and should not be considered infinitely expandable, as the Court of Appeals treats it. There must be a recognizable limit to the EIS process if it is to serve its intended function in federal decisionmaking. *Cf. NRDC v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972). Acceptance of the limitations of the EIS process does not denegrate its importance. Rather, it preserves it. The EIS was and is meant to serve only one role in federal decisionmaking. While assuring that environmental values are *considered*, NEPA does not require that an agency "elevate environmental concerns over other appropriate considerations." *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

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1. The many "socioeconomic" impact cases in which courts, with certain significant procedural limitations, have applied NEPA to "secondary" impacts provide no support for the interpretation of NEPA proffered by the Court of Appeals. Although secondary in nature, such impacts are physical effects suffered by the human environment as a result of the federal action. *Cf. Image of Greater San Antonio v. Brown, supra; National Association of Government Employees v. Rumsfeld, supra.* Such effects are not a function of human emotional reactions to the federal action.

The court below would like the EIS process to encompass all factors in any way related to a federal decision. Yet, assessment of emotional responses injects political and policy questions into the EIS. Indeed, the task of predicting or quantifying human emotions and responses, which are individual in nature and are influenced by the political views, social values, and emotional health of those individuals, would relegate to secondary importance the identification of direct physical effects on the environment, which is the intended function of the EIS. Even if an agency considers additional factors beyond physical environmental impacts, courts should not *mandate* consideration of factors beyond the statutory minimum imposed by NEPA for an EIS. *Cf. Kleppe v. Sierra Club*, 427 U.S. 390, 405-06 (1976).

The Court of Appeals majority did not, and indeed could not, convincingly limit the scope of its opinion. The potential situations in which a claim of psychological stress could be presented are limited only by the ingenuity of persons raising the contention. The Circuit Court majority's failure to draw a "bright line" establishing the intangible emotional reactions which must be considered under its new reading of NEPA is evidence of the impossible task of limiting the decision.

Instead, the decision lights a "bright beacon" for yet additional claims to be filed by opponents of controversial federal projects. Other actions which may present risks of physical harm to individuals will also produce real fears and emotional concerns. There is no reasonable basis upon which to determine whether fears and anxieties due to nuclear risks are any greater or more deserving of study in an EIS than emotional reactions of persons residing near a prison, a nuclear missile silo, an area of pesticide application, or a dam. Human emotions, such as fear of harm,

may even be more significant in those areas inasmuch as there is a higher probability of the physical harm associated with the activities occurring than an accident at a nuclear power plant. Strong emotional responses are also associated with other major activities which can alter the physical environment, including offshore oil leasing, mining and logging activities in national forests, location of high voltage transmission lines or even conventional electric generating facilities.

The majority's attempt to limit its decision to post-traumatic psychological stress caused by a near catastrophe finds no support in NEPA and serves only to illustrate the essentially political nature of the decision. Antipathy to nuclear power appears to be the *ratio decidendi*. As Judge Wilkey observed in his dissent:

> The majority's decision to ignore these many cases seems based ultimately on nothing more than a *political determination* that fears that Federal actions will 'change the character of the neighborhood, reduce property values, and increase the dangers of crime' are simply not worthy of consideration. Fears of nuclear power, on the other hand, must be considered, presumably because the majority considers them legitimate. *In each case, however, what we are dealing with are fears and anxieties; if NEPA embraces fears and anxieties in one, it must in all.* (Emphasis in original.)

678 F.2d at 241.

Unless this Court limits the scope of EIS to its intended function, NEPA may lose its utility. Political, emotional and philosophical reactions to federal decisions will arise no matter how this case is resolved. This Court must determine whether such reactions, even where so

strong they may produce ailments, must be examined in an EIS. Amicus submits that the mental basis of these reactions places them outside the realm of the physical environmental effects Congress specified that the EIS examine.

This Court has previously curtailed judicial expansion of the EIS beyond the precise procedural duty imposed by NEPA where the practical effects undercut the value and purpose of NEPA.

> Such an assertion of judicial authority would leave the agencies uncertain as to their procedural duties under NEPA, would invite judicial involvement in the day-to-day decisionmaking process of the agencies, and would invite litigation. . . . [I]t may be assumed that the balancing process devised by the Court of Appeals also would result in the preparation of a good many unnecessary impact statements.

Kleppe v. Sierra Club, *supra*, 427 U.S. at 406.

The practical effects associated with this decision are much more extreme and onerous than in *Kleppe*.[2] This Court should, therefore, review the decision and provide guidance to federal agencies before the Court of Appeals' decision leads to yet a new round of procedural battles under NEPA.

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2. If the language of the majority below regarding NEPA's "continuing obligation" to prepare a supplemental EIS is not limited by the particular procedural situation presented by TMI-1, the Court of Appeals' expansion of NEPA to include psychological effects will be even more dramatic and far-reaching. Amicus NRECA shares the concerns expressed by the Solicitor General in footnote 12 of the United States' Petition.

CONCLUSION

The questions presented in the petitions for certiorari are of great importance to the development of NEPA and of major significance to all those whose activities fall within the requirements of NEPA. The petitions for certiorari should be granted.

Respectfully submitted,

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